

THE PRESIDENT: On the 14th December, 1989, the plaintiff, A.C. Mauger & Son (Sunwin) Limited, on an ex parte application to the Royal Court (Samedi Division) obtained an Order of Justice against Victor Hugo Management Limited, the defendants, under which that company were restrained from removing their assets from the jurisdiction, or selling, dealing with or disposing of them in any way up to a limit of £1.8M. It was further ordered in terms to which I will shortly refer that the defendants were to serve an affidavit disclosing the full value of the defendants' assets within the jurisdiction. Service was also to be effected on the defendants' advocates, Ogier & Le Cornu, and on a bank, Cater Allen Bank (Jersey) Limited, who were similarly in each case to be restrained from dealing with the defendants' assets or removing them from the jurisdiction.

There was a further order whereby the defendant could be released from the effect of the restriction on dealing with its assets by paying £1.8M into the hands of the Viscount.

It will be apparent therefore that the interim order was for a Mareva injunction.

In addition to containing the usual undertaking as to damages and indemnification the Order of Justice contained the following provision: "(g) that save in relation to the shares nothing in this Order of Justice shall prevent the transfer of assets or payments of sums by or on behalf of the defendant to any third party pursuant to a legal obligation to do so on the part of the defendant existing prior to the date hereof". The shares referred to were the shares in two companies, 1, Maison Victor Limited and 3, Maison Victor Hugo Limited, wholly owned by the defendants.

The order for discovery was in the following terms: "(c) that service of this Order of Justice on the defendant shall operate as an immediate injunction to compel the defendant by a director, secretary, or other proper officer or authorised person to make and serve upon the Plaintiff's advocate, within four days of service of this Order of Justice upon the defendant, an affidavit disclosing the full value of

the defendant's assets within the jurisdiction of this Court identifying with full particulars the nature of all such assets and their whereabouts and whether the same be held in the defendant's own name or held jointly or held by nominees or otherwise on its behalf".

The defendants thereafter took out a summons to show cause why these interim injunctions should not be varied in two salient respects: (1) by removing the sale or disposal of the shares in 1 Maison Victor Hugo Limited and 3 Maison Victor Hugo Limited from the ambit of the Order by including them in the exception made in respect of the transfer of assets pursuant to a legal obligation existing prior to the date of the order; and (2) by deleting the order for discovery.

The defendants' application was heard by the Royal Court on the 20th December, 1989, and the Court acceded to the application, varying the terms of the injunction by deleting the reference to the shares from the terms of paragraph (g) and discharging the order for discovery contained in paragraph (c).

The plaintiff has applied also for leave to appeal this being an interlocutory matter and we have dealt with the substance of the appeal as the application.

It is, in addition, to be observed that there are pending applications on behalf of the defendants (that is the respondents in this appeal) to strike out the whole of the action including the injunctions contained in the Order of Justice as varied and that these are due to be heard in the Royal Court on the 26th and 27th November of this year.

The appeal as notified in the notice of appeal and as amplified by additional grounds of appeal, and indeed as originally placed before this Court in his submissions by Mr. Fiott on behalf of the appellants, appeared to proceed on a broad front. However, as matters progressed Mr. Fiott very wisely limited himself to his submissions with regard to the inclusion of an order requiring discovery in certain terms; in effect abandoning his wider grounds of appeal. He put before us this

morning a proposed draft which was substantially in the form originally ordered but with certain additional words to which I will refer later.

While this Court's powers to interfere with the exercise of a discretion on the part of the Royal Court are limited by the principles already adopted in this Jurisdiction and expressed in such cases as "The Abidin Daver" (1984) A.C. 398, we would have been prepared (the respondent's concession apart) to interfere with the Royal Court's refusal to make any order with regard to discovery. The concession made by the respondents to which I will refer later makes it unnecessary to give our reasons in any detail, but out of deference to the Royal Court we should explain that it is our view that once a Mareva injunction is ordered, the Court in policing that injunction should not be loath to make an order for discovery in some form appropriate to the circumstances of the case, although this is not to be an inflexible rule.

By way of analogy we refer to a passage from the judgment of Neill LJ in Avant Petroleum -v- Gatoil Overseas Inc., (1986) Lloyds Law Reports Vol. 2 236. At p.242 the learned Lord Justice said this: "However, for my part I would be very reluctant to lay down any inflexible rule which makes such disclosure" (that is to say disclosure of assets by way of affidavit) "obligatory. Thus there may well be cases where it can be demonstrated that certain debts are in the ordinary course discharged out of a particular fund and in such circumstances the bona fides of the payments could, I apprehend, be established without a full disclosure of assets. Moreover it is always to be remembered that there exists a risk that a party may seek to invoke the Mareva jurisdiction as an instrument of oppression or in order to effect the settlement of an action".

An affidavit by way of discovery of assets is only to be ordered in aid of a Mareva injunction. It is not to be ordered for the extraneous commercial benefit of the plaintiff who applies for it. It is right to say, however, that in order for the Court to grant a Mareva injunction it has to be satisfied among other things that there is a danger of dissipation of assets if such injunction were not to be granted. Once that position is reached it seems to us that it is

immaterial to the decision as to whether there should be an order by way of an affidavit as to assets, that the evidence upon which the Mareva injunction was obtained was of an inferential nature and indeed it is likewise in our view immaterial that the company is a locally registered company with a local board of directors.

For those reasons we would be prepared and are prepared to interfere with the discretion of the Royal Court in relation to the order of discovery.

We do not however need to go further in view of the respondents' very proper concession that they are prepared to swear such an affidavit as was originally ordered and indeed as is now sought by the appellants with exceptions which for reasons which we will shortly give are in our conclusion fully justified.

The first of these exceptions relates to the words "the full value of" as they appear in paragraph (c) of the original order and as they are repeated in paragraph (g) of the draft put before us by Mr. Fiott. The relevant part of the draft order in question reads as follows: "That service of this Order of Justice on the defendant shall operate as an immediate injunction to compel the defendant by a director, secretary or other proper officer or authorised person to make and serve an affidavit disclosing the full value of the defendants' assets within the jurisdiction of this Court". It is those words "the full value of" which remained in issue.

Mr. Fiott argued before us that those words are necessary for the proper policing of the Mareva injunction. While we can see that it would be commercially advantageous to the appellants to know the full value of those assets, we do not consider that such knowledge is a reasonable incident to the process of enforcing the Mareva injunction in circumstances such as these where the respondents are a development company with one development only in the Island.

Furthermore we should say that our attention has not been drawn to any authority which has so far reaching an effect as that which is contended by the appellants in this particular regard.

The second point which remained in issue relates to these additional words which were proposed for the first time in the draft put before us today, "and whether any of its assets are the subject of any charge or third party interest and if so charged or secured to produce a copy of the relevant agreement". As to this we need only say that these words were not in the order originally obtained nor were they argued before the Royal Court in the matter now under appeal and it is not open in the view of this Court for the appellant to seek now to add to the remedy which he obtained originally and which he then sought to retain before the Royal Court.

There are two further matters to which we would refer. First having regard to the corporate structure of the respondents and its subsidiaries, it is conceded on behalf of the respondents that the order should be wide enough to cover both the respondents and their subsidiaries.

Secondly, having regard to the pending application to strike out the action including the Mareva injunction, the order for discovery is to be satisfied by the lodging of an affidavit by the respondents with the Royal Court by the 3rd October, but not to be disclosed to the appellant until after the hearing of the application and then only if the application results in the Mareva injunction remaining in force or until further order of the Royal Court. Accordingly the order made by the Royal Court on the 20th December, 1989, is to be varied by adding a new paragraph to the schedule in the following terms: "That service of this Order of Justice on the defendant shall operate as an immediate injunction to compel the defendant by a director, secretary or other proper officer or authorised person to make and lodge with the Royal Court an affidavit by the 3rd October, 1990, disclosing the assets within the jurisdiction of this Court of the defendant and its subsidiaries identifying with full particulars the nature of all such assets and their whereabouts and whether the same be held in the defendants or its subsidiaries own name or held jointly, or held by nominees or otherwise on their behalf. And it is directed that such affidavit shall not be disclosed to the plaintiff until after the determination of the pending application before this Court to strike

out the action and relief by way of injunction and then only if the injunction remains in force or otherwise until further order of this Court".

There is one other matter to which we should refer and that is that as we perceive it the schedule as it left the Royal Court after the hearing under appeal and as it now stands does not define "the shares"; the shares are referred to in various parts of the schedule as it now stands but that part of it which defined the shares was excluded by the Royal Court and is not replaced by us. Therefore when the order comes to be drawn up it will be necessary for the parties to agree a proper manner in which the shares shall be defined.

Accordingly, we grant leave to appeal and make the orders provided for in that judgment.

We of course are more than happy to hear the submissions of the advocates on both sides with regard to costs. Having regard to the time it might be advisable if we were to give some prior indication as to how our minds are going and then if either of you wishes to address us and I promise that we will look at it de novo then you can do so at half past two. What we have in mind is making no order as to the appellant's costs and that the respondents should have the respondents' costs in the cause, but otherwise there will be no order as to costs.

(After hearing argument the order for costs was made in the terms set out above).

Authorities

- Purdie and Others -v- Gould and Others (28th March, 1989) Jersey Unreported C of A.
- Cutner -v- Green & Others (1980) JJ 269 C of A.
- Iraqi Ministry of Defence and Others -v- Aracepy Shipping Co (SA) (Gillespie Brothers Co Ltd intervening) (1980) 1 All ER 480 "(The Angel Bell)".
- A and Another -v- C and Others (1981) 1 WLR 629.
- A and Another -v- C and Another (No. 2) (1981) 1 WLR 634.
- PCW (Underwriting Agencies) Ltd -v- Dixon and Another (1983) 2 All ER 158.
- SCF Finance Co Ltd -v- Masri (1985) 2 All ER 747.
- K/S A/S Admiral Shipping -v- Portlink Ferries Ltd (1984) Lloyds Law Reports Vol. 2 166.
- Avant Petroleum -v- Gatoil Overseas Inc (1986) Lloyds Law Reports Vol. 2 236.
- Ashtiani & Griol -v- Kashi (1986) 2 All ER 970.
- Rahman -v- Chase Bank (CI) Trust Company Ltd & Others (1984) JJ 127 C of A.
- Goldrein & Wilkinson: Commercial Litigation: Pre-emptive Remedies 1987 pp. 73-79; 172-184.
- Erinford Properties Ltd and Another -v- Cheshire County Council (1974) 1 Ch. D 261.
- E D & F Man (Sugar) Ltd -v- Evalend Shipping Co (SA) and Another (1987) QB2 192.
- Dolphin Showers Limited -v- Farmilloe and Others (16th March, 1989) Aldous J (unreported).
- Johnson Matthey Bankers Ltd -v- Arya Holdings Ltd and National Westminster Bank plc (1985-86) J.L.R. 208.
- "The Abidin Daver" (1984) A.C. 398.
- The Supreme Court Practice 1988 Ed'n. (as amended) Rule 59/14/7.
- Hadmor Productions Ltd -v- Hamilton 1 AC 191.
- Garden Cottage Foods Ltd -v- Milk Marketing Board (1984) AC 130.
- The "Niedersachsen" (1983) 1 WLR 1412.
- Derby & Co Ltd -v- Weldon (1989) 2 WLR, 276.
- Chanel -v- F.W. Woolworth & Co Ltd and Others (1981) 1 All ER.